Supreme Court, U.S.
FILED

001629 APR 23 2001

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No. 00-

IN THE

Supreme Court of the United States

JUNO MARINE AGENCY, INC., a Florida corporation, NAVIERA TURRIALBA/INVERSIONES JUNO, S.A., and GARDA MARINE, INC.,

Petitioners,

v.

TRACY TAIBL, Special Personal Representative of the Estate of STACEY NORMAN TAIBL, for the Use and Benefit of TRACY TAIBL, minor daughter, and the Estate of Stacey Norman Taibl, deceased,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL, STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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78 pp.

QUESTIONS PRESENTED

I.

Does a maritime wrongful death claimant's entitlement to the warranty of seaworthiness, a general maritime species of strict liability, render the claimant a "seafarer" under *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), and thus foreclose access to state law wrongful death remedies?

II.

Assuming Taibl was properly treated as a *Yamaha* "non-seafarer," must the recovery of punitive damages nevertheless "yield to the needs of uniform federal maritime law," *Yamaha*, 516 U.S. at 211 n.8, which prohibits recovery of non-pecuniary damages in accordance with *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)?

CORPORATE DISCLOSURE STATEMENT

None of the three now defunct corporate petitioners has a parent corporation and none of the three is or was a publically held company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Federal Statutes Involved	1
Statement of the Case	3
Reasons for Granting the Writ	7
Reason I.	7
Reason II.	14
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

American Dredging Company v. Lambert, 81 F.3d 127 (11th Cir. 1996) 11

Bergen v. F/V St. Patrick, 816 F.2d 1345 (9th Cir. 1987), *modified in part*, 866 F.2d 318 (9th Cir. 1989) 15

CEH Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995) 16

Complaint of Garda Marine, 9 F.3d 1558 (11th Cir. 1993) 5

Complaint of Goose Creek Trawlers, Inc., 972 F. Supp. 946 (E.D.N.C. 1997) 12

Complaint of Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981) 6

Dos Santos v. Ajax Nav. Corp., 531 So. 2d 231 (Fla. 3d DCA 1988), *cert. dismissed*, 489 U.S. 1048 (1989) 16

Florida Power & Light Company v. Polackwich, 677 So. 2d 880 (Fla. 2d DCA 1996), *rev. dismissed*, 682 So. 2d 1100 (Fla. 1996) 11

Cited Authorities

	Page
Garris v. Norfolk Ship Building and Dry Docket Corporation, 210 F.3d 209 (4th Cir. 2000), *rev. granted*, __ U.S.__, 121 S. Ct. 653 (2000)	9
Ghotra v. Bandila Shipping, Inc., 113 F.2d 1050 (9th Cir. 1997)	12
Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495 (9th Cir. 1995)	15
Grigsby v. Coastal Marine Services of Texas, Inc., 412 F. 2d 1111 (5th Cir. 1969), *cert. denied*, 396 U.S. 1033 (1970)	4, 12
Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996)	6, 15, 16
Horsley v. Mobile Oil Corp., 15 F.3d 200 (1st Cir. 1994)	15
In re Amtrak "Sunset Ltd." Train Crash, 121 F.3d 1421 (11th Cir. 1997)	12, 16
Kelly v. Bass Enterp. Prod. Co., 17 F. Supp.2d 591 (E.D. La. 1998)	11
Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959)	4

Cited Authorities

Page

Krummel v. Bombardier, Corp., 1997 U.S. Dist. Lexis 481 (E.D. La. 1997) 11

Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548 (1945) 1

McDermott v. Wilander, 498 U.S. 337 (1991) 4, 5

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) ... *passim*

Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989) 15

Miller v. American President Lines Ltd., 989 F.2d 1450 (6th Cir. 1993) *cert. denied*, 510 U.S. 915 (1993) 15, 16

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 8, 9, 12

Scindia Steam Navigation Company, Ltd. v. De Los Santos, 451 U.S. 156 (1981) 3

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 3, 9, 12

Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991) 5

The Florida Star v. BJF, 530 So. 2d 286 (Fla. 1988) 1

Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996) ..... *passim*

Cited Authorities

	Page
Statutes:	
28 U.S.C. § 1257(a)	1
28 U.S.C. § 1331	6
33 U.S.C. § 900, *et seq.*	3
33 U.S.C. § 905(b)	2
46 U.S.C. §§ 183-185	3
46 U.S.C. § 688	1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The District Court Of Appeal Of Florida For The Third District Dated April 26, 2000 (Rehearing Denied July 26, 2000) 1a

Appendix B — Amended Final Judgment Of The Circuit Court Of The 11th Judicial Circuit In And For Dade County, Florida, General Jurisdiction Division Dated August 31, 1998 And Recorded September 3, 1998 ..... 4a

Appendix C — Order Of The Supreme Court Of Florida Denying Petition For Review Dated January 22, 2001 ..... 12a

Appendix D — Order Of The United States District Court For The Southern District Of Florida Dated February 3, 1992 ..... 14a

Appendix E — Memorandum Of Decision And Order Of The United States District Court For The Southern District Of Florida Dated April 23, 1992 ..... 20a

Appendix F — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed February 15, 1996 ..... 48a

Appendix G — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated November 16, 1993 ..... 51a

OPINIONS BELOW

The decision below is reported at 761 So. 2d 373 (3d DCA 2000), *rev. denied* January 22, 2001 (Fla. 2001), and is reprinted in the appendix at App. 1a. The Amended Final Judgment of the Circuit Court of the Eleventh Judicial Circuit, dated August 31, 1998, is unpublished and is reprinted in the Appendix at App. 4a.

STATEMENT OF JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). The Florida Third District Court of Appeal's opinion was entered on April 26, 2000. The Florida Supreme Court denied discretionary review on January 22, 2001. (App. at 12a). This petition is timely filed within 90 days of January 22, 2001.

The opinion below represents "The final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548 (1945). The decision of the Third District Court of Appeal is a final decision from the highest court in Florida in which a decision could be had because the Florida Supreme Court denied discretionary review. *See The Florida Star v. BJF*, 530 So. 2d 286 (Fla. 1988). Accordingly, this petition is timely filed within 90 days of the Florida Supreme Court's order of January 22, 2001 declining to accept jurisdiction.

FEDERAL STATUTES INVOLVED

46 U.S.C. § 688: "The Jones Act"

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law,

> with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action, all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. . . .

33 U.S.C. § 905(b): "Longshore and Harbor Workers' Compensation Act"

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of § 933 of this Title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or breach thereof* at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(Emphasis added.)

STATEMENT OF THE CASE

Stacey Taibl, a longshoreman, died while trying to rescue a member of the crew of the M/V Turrialba, which was docked at the port of Miami. Taibl's estate filed suit in state court against the vessel's owner and charterer, Garda Marine and Naviera Turrialba, S.A., pursuant to 33 U.S.C. § 900, *et seq.* (Longshoreman and Harbor Worker's Compensation Act, or LHWCA), and Florida's Wrongful Death Act. In response, Naviera filed a petition for exoneration or limitation of liability in United States district court pursuant to 46 U.S.C. §§ 183-185 (the Limitation proceeding).

The federal court issued a "monition," which enjoined all pending state court proceedings arising out of the incident. Taibl then filed his claim in federal court where he continued to assert that he was a stevedore acting in the course and scope of his employment at the time of the incident. Indeed, Taibl's estate received benefits pursuant to the LHWCA.

Taibl sought access to the warranty of seaworthiness when liability was addressed in the limitation proceeding. However, Taibl could not access the warranty of seaworthiness in his capacity as a longshoreman.[1]

1. Between 1946 and 1972 longshoremen injured aboard vessels were deemed to be seamen, and accordingly were afforded the warranty of seaworthiness. However, in 1972 Congress amended the LHWCA to provide a form of worker's compensation coverage and abolish the longshoreman's claim to the warranty of seaworthiness. *See generally*, *Scindia Steam Navigation Company, Ltd. v. De Los Santos*, 451 U.S. 156 (1981) (acknowledging that the 1972 Amendments effectively overruled *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), which had secured to longshoremen the warranty of seaworthiness, giving rise to the term "*Sieracki* seaman").

Nor could Taibl access the warranty of seaworthiness as a guest aboard the vessel. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

After two police officer claimants successfully argued that they were entitled to the warranty of seaworthiness in their capacity as marine salvors, or Good Samaritans, pursuant to *Grigsby v. Coastal Marine Services of Texas, Inc.*, 412 F. 2d 1111 (5th Cir. 1969), *cert. denied*, 396 U.S. 1033 (1970), Taibl argued that he, too, was a seaman entitled to the warranty of seaworthiness pursuant to *Grigsby*. In *Grigsby*, a port security guard was deemed to be a *Sieracki* seaman because he boarded a vessel in an attempt to save a member of its crew.

In February of 1991, Garda moved for summary judgment on the issue of punitive and other non-pecuniary damages, arguing that *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), precluded the recovery of such damages by Taibl's estate. *Miles* held that the mother of a seaman who was killed in territorial waters could not recover greater damages under her general maritime claims than she could under her Jones Act claim.

The district court issued an omnibus order on October 10, 1991, which rejected Taibl's claim that he was entitled to maintain an action for breach of the warranty of seaworthiness based upon *Grigsby*. The Court ruled that as a result of the 1972 amendments to the LHWCA, an injured longshore worker such as Taibl is not entitled to the warranty of seaworthiness. The order relied upon *Miles v. Apex* and *McDermott v. Wilander*, 498 U.S. 337 (1991).

On the eve of the federal bench trial, Taibl filed a motion for relief from the order, relying upon this Court's then-recent opinion in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), in which, Taibl asserted, "a unanimous Supreme Court held that a maritime worker, whose occupation is one of those enumerated in the [LHWCA], *may nevertheless still be a seaman within the meaning of the Jones Act* and therefore entitled to bring suit for the full panoply of seamen's remedies." (App. 14a). (Emphasis added).

On February 3, 1992 a visiting judge granted Taibl's request that he be accorded seaman status. (App. 18a). The court noted that in *Gizoni* this Court had cited *McDermott International v. Wilander*, 498 U.S. 337 (1991), for the proposition that "the key to seaman status is employment related connection to a vessel in navigation . . . it is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, *but a seaman must be doing the ship's work.*" (App. 17a). The judge concluded that "Taibl was aboard the M/V Turrialba . . . *to do ship's work*," *i.e.*, to rescue a member of the crew. (emphasis added) (App. 18a). The memorandum of decision and order was affirmed in a per curiam decision without written opinion. *See Complaint of Garda Marine*, 9 F.3d 1558 (11th Cir. 1993) (App. 15a).

Upon remand, Garda renewed its motion for summary judgment on the issue of Taibl's entitlement to punitive damages pursuant to maritime law. In an omnibus order, the district court denied Garda's motion, recognizing that although other jurisdictions had held, pursuant to *Miles*, that punitive damages were no longer allowed in wrongful death actions under general maritime law, he was still bound by

the old Fifth Circuit decision in *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981).[2] In that same order, the district court lifted the monition, and remanded the claim to state court pursuant to the saving-to-suitors clause, 28 U.S.C. § 1331.

The petitioners appealed once again, arguing against remand to state court. The Eleventh Circuit Court of Appeals affirmed the lifting of the monition, but reserved the issue of punitive damages to the state court for resolution. (App. 48a).

One month before the Eleventh Circuit's affirmance, this Court issued *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) which held:

> Traditionally, state remedies had been applied in accident cases of this order — maritime wrongful death cases in which no federal statute specifies the appropriate relief *and* the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold . . . that state remedies remain applicable in such cases . . .

116 S. Ct. at 621-22. (Emphasis added)

Despite the fact that Taibl- at his estate's insistence- was deemed to have been a seaman at the time of his death, his estate was allowed to recover damages, including punitive damages, under Florida state law on the theory that Taibl was a *Yamaha* "non-seafarer." (App. 5a).

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2. A year later *Merry Shipping* was explicitly overruled by the Fifth Circuit Court of Appeals, sitting *en banc* in *Guevara v. Martime Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995) ("After *Miles*, it is clear that *Merry Shipping* has been effectively overruled."), *cert. denied*, 116 S. Ct. 706.

The Jury returned its verdict on March 6, 1998. In an interrogatory verdict, it awarded $1,000,000 for Mr. Taibl's pre-death pain and suffering, $550,000 for his emancipated daughter's past pain and suffering, $500,000 for her future pain and suffering, and $3,500,000 for punitive damages. (App. 5a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because this case raises two important but unanswered questions in the wake of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) and *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

I.

In *Yamaha* this Court openly acknowledged that it attempted "no grand synthesis or reconciliation of our precedent" concerning the interplay between federal maritime law and state law. 516 U.S. at 211 n.8. Now is the time for this Court to announce, at the very least, a synthesis of *Miles* and *Yamaha*, with respect to damages available in maritime wrongful death actions. That synthesis, we respectfully suggest, is this:

> In maritime wrongful death actions, a claimant's access to the warranty of seaworthiness, a general maritime species of strict liability, forecloses access to state wrongful death remedies.

Miles, traced the origin and development of maritime wrongful death causes of action available to seamen, i.e., the Jones Act (negligence) and general maritime law (doctrine of seaworthiness). After discussing the history of the two causes of action (and noting that wrongful death recovery

under general maritime law was a strictly judicial creation), this Court held that *any* recovery for the wrongful death of a seaman, even under a general maritime claim, is governed by the Jones Act:

> The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.
>
> * * *
>
> Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

Miles, 498 U.S. at 32-33.

In *Yamaha*, this Court signaled its recognition of the concept that access to state law wrongful death remedies is foreclosed by entitlement to the doctrine of seaworthiness in its discussion of the origins of the general maritime wrongful death action established in *Moragne v. States*

Marine Lines, Inc., 398 U.S. 375 (1970), by confirming that the creation of the *Moragne* general maritime wrongful death cause of action coincided with the rise of the unseaworthiness doctrine as "a species of liability without fault," 516 U.S. at 208 (citing *Seas Shipping Company v. Sieracki*, 328 U.S. 85 (1946)). "[T]he disparity between the unseaworthiness doctrine's strict liability standard and negligence-based state wrongful death statutes figured prominently in our landmark *Moragne* decision." *Id.*

Moragne, like the present case, involved the death of a longshore worker in Florida's territorial waters. *Id.* However, because Florida's wrongful death statute did not encompass unseaworthiness as a basis of liability, Moragne's unseaworthiness claim was dismissed. Accordingly, in *Moragne*, this Court created a general maritime cause of action for wrongful death based upon the unseaworthiness doctrine.[3] *Moragne*, 398 U.S. at 378; *Yamaha*, 516 U.S. at 209.

In *Yamaha* this Court acknowledged that it had created such a cause of action because "Nothing short of a federal maritime right of action for wrongful death could have achieved *uniform access by seafarers to the unseaworthiness doctrine*, the Court's driving concern in *Moragne*." 516 U.S. at 213 n.10. (Emphasis added).

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3. On December 11, 2000, this Court granted a petition for writ of certiorari to review *Garris v. Norfolk Ship Building and Dry Docket Corporation*, 210 F.3d 209 (4th Cir. 2000), *rev. granted*, __ U.S.__, 121 S. Ct. 653 (2000), in which the Fourth Circuit recognized a negligence-based general maritime wrongful death cause of action, despite its acknowledgment that *Moragne* did not establish a general maritime law cause of action for wrongful death based upon negligence, but rather upon the breach of the duty of seaworthiness.

Finally, acknowledging *Miles*, this Court observed that "When congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided." 516 U.S. at 215 (quoting *Miles*, 498 U.S. at 30-36). In *Yamaha*, this Court held that because the death of 12 year old Natalie Calhoun on a jet ski was not governed by any federal maritime statute, and because Natalie Calhoun was neither a seaman, a longshoreman or otherwise engaged in a traditional maritime activity, her family could supplement with state law the remedies provided by general maritime law to the extent that those state law remedies did not conflict with established maritime principles. 516 U.S. at 216.

Respondent Taibl avoided application of *Miles* by relying upon a narrow exception created by *Yamaha*, which applies only to "non-seafarers." In *Yamaha*, this Court held that where the decedent's remedies are not governed by a federal statute, *i.e.*, the Jones Act or LHWCA, *and* the decedent is not "a seaman, longshore worker, or person otherwise engaged in maritime trade," then federal maritime law does not supplant state wrongful death and survival statutes. *Yamaha*, 516 U.S. at 202.

The initial group of persons identified in *Yamaha* as seafarers includes those whose remedies are governed by a federal statute. However, by use of the conjunctive "and," *Yamaha* created a broad class of seafarers which includes seamen, longshore workers, or persons otherwise engaged in maritime trade. By referring first to those covered by federal statute and then to this latter group of individuals, this Court obviously intended to include as "seafarers" those

identified classes of individuals even when they were not "covered" under a federal maritime statute.[4]

However, footnote 2 of *Yamaha* has created confusion below because it defines "non-seafarers" to mean

> [P]ersons who are neither seaman covered by the Jones Act, 46 U.S.C. App. § 688 (1988 ed.), nor Longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*

Yamaha, 516 U.S. at 205 n.2.

Other than the decision below, *Yamaha* has been applied, as this Court intended, primarily to recreational boaters, a fact that confirms our narrow reading of the definition of "non-seafarers." *See, e.g., American Dredging Company v. Lambert*, 81 F.3d 127 (11th Cir. 1996) (recreational boater); *Kelly v. Bass Enterp. Prod. Co.*, 17 F. Supp.2d 591 (E.D. La. 1998) (recreational boater); *Krummel v. Bombardier, Corp.*, 1997 U.S. Dist. Lexis 481 (E.D. La. 1997) (unpublished) (jet skier); *Florida Power & Light Company v. Polackwich*, 677 So. 2d 880 (Fla. 2d DCA 1996) (recreational boater).

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4. Indeed, in *Miles*, this Court rested its holding on the *status* of the decedent, *i.e.*, a seaman, rather than the source, statutory or general maritime, of the mother's claim. Clearly, the Jones Act did not actually apply to all of the mother's claims as some of the defendants were not the decedent's employer. Nevertheless, because the Jones Act applied to the decedent's status, his mother's recovery could not exceed that statute's available damages. *Miles*, 498 U.S. at 37 ("We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that the damages recoverable in such an action do not include loss of society. We also hold that a general maritime survival action cannot include recovery for a decedent's lost future earnings.").

Cf. In re Amtrak "Sunset Ltd." Train Crash, 121 F.3d 1421 (11th Cir. 1997) (classifying train passengers as non-seafarers). Conversely, where the decedent was a longshoreman, a seaman, or otherwise engaged in a maritime trade, the courts have applied *Miles*, not *Yamaha*.

Miles and *Yamaha* are easily applied to cases where the decedent was unquestionably a Jones Act seaman or a longshore worker and his survivors are making a claim under those statutes. However, their application becomes somewhat murky when, for one reason or another, a claim does not fit neatly and completely within one of those statutes. *See, e.g., Ghotra v. Bandila Shipping, Inc.*, 113 F.2d 1050 (9th Cir. 1997) (self-employed longshoreman was a "seafarer" even though he had no employer to sue under the LHWCA), and *Complaint of Goose Creek Trawlers, Inc.*, 972 F. Supp. 946 (E.D.N.C. 1997) (owner/captain of commercial shrimping vessel was a "seafarer" even though not a Jones Act seaman or a longshoreman).

Taibl claimed below that he was a "*Grigsby*" seaman, not a Jones Act seaman.[5] But whether he is considered to be

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5. In *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir. 1969), decided prior to this Court's creation of the general maritime wrongful death of action in *Moragne, supra*, the Fifth Circuit posed and answered in the affirmative the following questions: "Does an amphibious Good Samaritan succeed vicariously to the *Sieracki* vicarious seamen's status of the ship repairer victim? If so, does the *Sieracki* warranty of seaworthiness extend to him?" 412 F.2d at 1015. The *Sieracki* reference is to this Court's opinion in *Seas Shipping Company v. Sieracki*, 328 U.S. 85 (1946), which extended the warranty of seaworthiness to longshore workers. However, as this Court has noted, *Sieracki* was overruled by the 1972 amendments to the LHWCA. *See* n.1, *supra*. In light of *Grigsby's* reliance on *Sieracki*, *Grigsby* is no longer good law.

a longshoreman, a Grigsby seaman, or a Jones Act seaman, he was unquestionably a "seafarer" as that term was used by this Court in *Yamaha*. Accordingly, his recovery should have been limited to those available under the Jones Act, or the LHWCA.

The court below failed to take account of the factual scenario under which *Yamaha* was decided. *Yamaha* involved a 12 year old girl who was killed while riding a jet ski. Indisputably, the child was not covered by a maritime statute, *i.e.*, the Jones Act, LHWCA or DOHSA, *and* she was neither a seaman, a longshoreman, or otherwise engaged in maritime trade. Under those circumstances, this Court found that allowing her estate to supplement general maritime wrongful death remedies with state wrongful death remedies did not conflict with established maritime law.

The Third District Court of Appeal opinion makes no reference to the fact that Taibl was a longshoreman, or that the U.S. District Court had determined (at Taibl's request) that he was a seaman, and therefore entitled to the warranty of seaworthiness. Rather, the Third District's opinion states, cryptically, that

> Stacey Taibl, who was working nearby for another employer, was killed while attempting to rescue a member of the crew (who also died) from the hold of the defendant's vessel while it was moored at government cut in Miami-Dade County.

(App. 2a).[6]

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6. Clearly, the estate of the seaman referenced in the Third District's opinion could not recover non-pecuniary damages, i.e., loss of society and punitive damages, under *Miles*. It would be (Cont'd)

Having thus glossed over the true nature of Mr. Taibl's seafaring status, the Third District held:

> The trial court correctly determined that, because Taibl died on Florida territorial waters in an accident covered neither by the Jones Act, the Longshore and Harbor Workers' Compensation Act, nor the Death on the High Seas Act, his survivors were entitled to supplement their maritime remedies with those available for wrongful death under Florida law, including a claim for punitive damages. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L.Ed.2d 578 (1996) . . .

Id.

Accordingly, the Court misapplied both *Miles* and *Yamaha* by narrowly interpreting "seafarers" to mean only those with a statutory claim, and by failing to acknowledge Taibl's status as a seaman.

II.

After being accorded the status of seaman, and consequently the warranty of seaworthiness, in the limitation proceeding on liability, Taibl's estate altered its position on remand to state court, and argued under *Yamaha* that Mr. Taibl was neither a longshoreman nor a Jones Act seaman. Instead, the estate argued that Taibl was a non-seafarer whose survivors were entitled to supplement their recovery with non-pecuniary remedies allowed under Florida law. Having

(Cont'd)
inconsistent with *Miles* and *Yamaha* to bestow the benefit of the warranty of seaworthiness upon Taibl, yet allow him a far greater recovery than would be allowed a member of the ship's crew.

obtained the warranty of seaworthiness during the liability phase of the limitation proceeding, Taibl's estate should have been estopped to claim "non-seafarer" status during the state court trial on damages.

As this Court observed in *Miles*:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery and survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

Miles, 498 U.S. at 36 (1990). Likewise, this case involves the death of a seaman, and the estate's recovery is governed by the Jones Act.

In *Miles*, this Court did not directly address punitive damages since their recovery had already been denied by the Fifth Circuit. *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989). However, a majority of the United States Circuit Courts of Appeal (before and after *Miles*) have recognized that because punitive damages are "non-pecuniary damages", they are not recoverable in seamen's cases. *See, e.g., Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1506 (5th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995); *Horsley v. Mobile Oil Corp.*, 15 F.3d 200 (1st Cir. 1994). *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987), *modified in part*, 866 F.2d 318 (9th Cir. 1989); *Miller v. American President Lines Ltd.*, 989 F.2d 1450

(6th Cir. 1993) *cert. denied*, 510 U.S. 915 (1993). *Cf. In re: Amtrak Sunset Ltd. Train Crash, supra*, (punitive damages available to non-seafarer train passengers under general maritime law wrongful death action).

In the face of this overwhelming authority which prohibits the recovery of punitive damages in cases involving injury to or death of seamen, the court below relied upon *CEH Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), which involved *property damage*.

In addition, the Court below relied upon *International Ships Services Limited v. Canales*, 639 So. 2d 74 (Fla. 3d DCA 1994), and *Dos Santos v. Ajax Nav. Corp.*, 531 So. 2d 231 (Fla. 3d DCA 1988), *cert. dismissed*, 489 U.S. 1048 (1989), two maintenance and cure cases which rely upon the since-reversed *Merry Shipping* decision.

The decision below is contrary to the overwhelming weight of authority which recognizes that punitive damages are not recoverable in a seaman's personal injury or wrongful death claim. This Court should take this opportunity to explicitly apply its holding in *Miles* to punitive damages.

CONCLUSION

This Court should grant the writ of certiorari and accept jurisdiction of this case where the estate of the decedent, a longshoreman by trade, and a Jones Act seaman by request, was nevertheless allowed to recover non-pecuniary state law remedies that are inimicable to general maritime law. In addition, this Court should seize this opportunity to clarify whether or in what circumstances punitive damages may be recoverable under federal maritime law.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE THIRD DISTRICT DATED APRIL 26, 2000 (REHEARING DENIED JULY 26, 2000)

DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

No. 3D98-2287

JUNO MARINE AGENCY, INC., a Florida corporation, NAVIERA TURRIALBA/INVERSIONES JUNO, S.A., and GARDA MARINE, INC.,

Appellants,

v.

TRACEY TAIBL, Special Personal Representative of the ESTATE OF STACEY NORMAN TAIBL, for the Use and Benefit of TRACEY TAIBL, minor daughter, and the ESTATE OF STACEY NORMAN TAIBL, deceased,

Appellees.

April 26, 2000.
Rehearing Denied July 26, 2000.

* * *

Before SCHWARTZ, C.J., and GODERICH and GREEN, JJ.

Appendix A

SCHWARTZ, Chief Judge.

Stacey Taibl, who was working nearby for another employer, was killed while attempting to rescue a member of the crew (who also died) from the hold of the defendants' vessel while it was moored at Government Cut in Miami-Dade County. On this appeal, the appellants-defendants challenge a judgment entered upon a jury verdict in a maritime-wrongful death action against them. We find no merit in any of the points they present.

Treating only those issues which require even brief discussion, we conclude

(a) The trial court correctly determined that, because Taibl died on Florida territorial waters in an accident covered neither by the Jones Act, the Longshore and Harbor Workers Compensation Act, nor the Death on the High Seas Act, his survivors were entitled to supplement their maritime remedies with those available for wrongful death under Florida law, including a claim for punitive damages. See *Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996); *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694 (1st Cir.1995); *Florida Power & Light Co. v. Polackwich,* 677 So.2d 880 (Fla. 2d DCA 1996), *review dismissed,* 682 So.2d 1100 (Fla.1996); *International Ships Services, Ltd. v. Canales,* 639 So.2d 74 (Fla. 3d DCA 1994); *Dos Santos v. Ajax Nav. Corp.,* 531 So.2d 231 (Fla. 3d DCA 1988), *cert. dismissed,* 489 U.S. 1048, 109 S.Ct. 1304, 103 L.Ed.2d 574 (1989).

Appendix A

(b) The facts fully sustain the jury verdict awarding punitive damages in this particular case. *First Healthcare Corp. v. Hamilton,* 740 So.2d 1189 (Fla. 4th DCA 1999), *review dismissed,* 743 So.2d 12 (Fla.1999); *Ellison v. State,* 547 So.2d 1003 (Fla. 1st DCA 1989), *aff'd. in part, quashed in part,* 561 So.2d 576 (Fla.1990); *State v. Brooks,* 163 Vt. 245, 658 A.2d 22 (1995); *People v. Neff,* 117 Cal.App.2d 772, 257 P.2d 47 (1953); see also *Turner v. PCR, Inc.,* 754 So.2d 683 (Fla. 2000).

(c) Prejudgment interest was properly awarded. See *City of Milwaukee v. Cement Div. Nat. Gypsum Co.,* 515 U.S. 189, 115 S.Ct. 2091, 132 L.Ed.2d 148 (1995); *Hilton Oil Transport v. Oil Transport Co.,* 659 So.2d 1141 (Fla. 3d DCA 1995).

Affirmed.

APPENDIX B — AMENDED FINAL JUDGMENT OF THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA, GENERAL JURISDICTION DIVISION DATED AUGUST 31, 1998 AND RECORDED SEPTEMBER 3, 1998

THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 88-45327 CA 22

TRACEY TAIBL, Special Personal Representative of the ESTATE OF STACEY NORMAN TAIBL, for the use and benefit of TRACEY TAIBL, minor daughter, and the ESTATE OF STACEY NORMAN TAIBL,

Plaintiff,

vs.

JUNO MARINE AGENCY, INC., a Florida corporation, NAVIERA TURRIALBA, S.A., and GARDA MARINE, INC.,

Defendants.

AMENDED FINAL JUDGMENT

THIS CAUSE came before the Court on August 31, 1998 on the Plaintiff's Motion to Determine Interest Rate and Finalization of Judgment and the Plaintiff's Motion for Clarification of Final Judgment, said Final Judgment being entered by the Court on August 11, 1998. The Court heard

argument of counsel and considered the record. Based on that consideration, the Court finds and enters an amended final judgment as follows:

1. This case arose in admiralty when, on October 4, 1998, Mr. Taibl died while trying to rescue people from a carbon monoxide filled hole on a vessel. As a matter of admiralty law, the jury was instructed to consider Mr. Taibl's pre-death pain and suffering. Pursuant to *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 116 S.Ct. 619 (1996), the jury was also instructed to supplement this admiralty remedy with the remedies available under the Florida wrongful death statute, including punitive damages.

2. The jury returned its verdict on March 6, 1998. In an interrogatory verdict, it awarded $1,000,000 for Mr. Taibl's pre-death pain and suffering, $550,000 for Tracey Taibl's past pain and suffering, $500,000 for Tracey Taibl's future pain and suffering, and $3,500,000 for punitive damages.

3. Plaintiff seeks prejudgment interest on the $1,000,000 pre-death pain and suffering award and the $550,000 award for Tracey Taibl's past pain and suffering. In light of the extended time which has passed since the jury's verdict, Plaintiff also seeks interest on all of the awards from the date of the verdict. Defendants argue that any award of prejudgment interest is improper. Defendants also argue that it is improper to award interest from the date of the jury's verdict.

4. Defendants initially argue that prejudgment interest should be denied because the Plaintiff did not plead

entitlement to prejudgment interest. However, Plaintiff's Amendment to First Amended Complaint, dated January 13, 1997, specifically asks for "compensatory and punitive damages together with interest and pre-judgment interest and costs . . . ."

5. The Court first considers the $1,000,000 pre-death pain and suffering award. Defendants argue that no award of prejudgment interest is proper because this award was made in admiralty, and in admiralty prejudgment interest can only be awarded by the jury when the jury is the fact finder awarding damages. The Court rejects the Defendants' arguments for two reasons.

6. First, Defendants' cases involve situations where the jury resolves all issues in the case. Indeed, as one of Defendants' cases puts it, "where a maritime cause of action is tried *solely* to a jury which has been demanded under the exercise of diversity jurisdiction the grant or denial of prejudgment interest must be submitted to the jury." *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54, 55 (5th Cir. 1981). Here, the jury did not resolve *all* the issues of liability. Liability issues were resolved in the non-jury limitation of liability proceeding. When liability issues are resolved nonjury, and damage issues are resolved by the jury, it cannot be said that the case was tried "solely" to a jury. The point is not merely a technical one. Requiring the jury to award prejudgment interest here would require them to consider what happened in the limitation of liability proceeding, i.e., who caused the delay, an issue which was not before them. It is significant that at least one court has awarded prejudgment interest precisely in this situation. *Stissi v.*

Interstate Ocean Transport Co., 765 F.2d 370 (2d Cir. 1985) (trial court properly awarded prejudgment interest where trial court decided liability issues in limitation proceeding and jury determined damages in subsequent proceeding).

7. Second, the cases on which Defendants rely devolve from Judge Learned Hand's decision in *Newburgh Land & Dock Co. v. Texas Co.*, 227 F.2d 732 (2d Cir. 1955). As Judge Hand puts the issue, "[i]t is the federal law that in actions at law when the award of interest rests in discretion, it is the jury who must exercise it . . . ." *Id.* at 735. But here, there was no issue of discretion which could be exercised by the jury.

8. In admiralty cases, prejudgment interest must be awarded unless "exceptional or unusual circumstances would make it inequitable for the losing party to pay prejudgment interest . . . ." *International Trade Assist. Corp. v. Forms Manufacturing Equipment, Inc.*, 596 So.2d 1288 (Fla. 1st DCA 1992). The existence of disputed fact issues do *not* establish such exceptional or unusual circumstances. *City of Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189, 115 S.Ct. 2091 (1995). As one court has put it, the award of prejudgment interest in admiralty cases "is well-nigh automatic." *Reeled Tubing, Inc. v. M/V Chad G*, 794 F.2d 1026, 1028 (5th Cir. 1986).

9. Defendants do not contest that this is the standard. Under this standard, there are no "exceptional or unusual circumstances" which a jury could gave considered for the purpose of determining whether or not to award prejudgment interest. There is no evidence that prosecution of this case

was unduly delayed by the Plaintiff; to the contrary, the record shows it was delayed by the Defendants. Simply put, no fact issue existed in this regard for the jury to consider.

10. Defendants suggest that the jury had to determine the date from which interest would begin to run. But no such issue exists. Since this was a death case, prejudgment interest would begin to run on the date of death, which is undisputed. Defendants also suggest that the jury should have determined the rate of interest to be applied, i.e., that the parties should have litigated the issue of interest rates. The law does not require that issue to be litigated before the jury. *DoCarmo v. F.V. Pilgrim I. Corp.*, 612 F.2d 11 (1st Cir. 1979) (jury resolved prejudgment interest issue by answering question "yes" or "no", and the court thereafter determined the interest rate).

11. In this case, there were no "unusual" or "peculiar" circumstances which would warrant the denial of prejudgment interest; there were no issues within the jury's discretion which had to be litigated. In fact, the Court cannot envision how the jury would have been instructed on the issue of prejudgment interest since no issue exists.

12. Under these circumstances, the Court finds that it may award prejudgment interest. It is significant that other admiralty courts, including at least one Florida court, have awarded prejudgment interest even though the jury has determined other aspects of the case, especially where, as here, the jury has returned an itemized verdict separating the elements of damage to which prejudgment interest attaches. *International Trade Assistance Corp.*, 596 So.2d

1288 (trial court erred in denying post-verdict motion for prejudgment interest in admiralty case where jury decided damages); *Hiller v. Southeast Towing Co.*, 740 F.2d 583 (7th Cir. 1984); *Larsen v. Sittmar Cruises*, 602 N.Y.S.2d 981 (1993); *Stissi v. Interstate and Ocean Transport*, 590 F.Supp. 1043 (E.D.N.Y. 1984), *affirmed*, 765 F.2d 370 (2d Cir. 1985); *Columbia Brick Works, Inc. v. Royal Insurance Co.*, 768 F.2d 1066 (9th Cir. 1985). *See also Reichert v. Chemical Carriers, Inc.*, 794 F.2d 1557 (11th Cir. 1986) (suggesting that prejudgment interest may be awarded if plaintiff asks for a jury instruction or jury instructed to return itemized verdict); *Domangue v. Penrod Drilling Co.*, 748 F.2d 999, 1001 n.1 (5th Cir. 1984) (same).

13. As a result, the Court determines that Plaintiff is entitled to prejudgment interest on the $1,000,000 pre-death pain and suffering award from October 4, 1988, the date of death, to August 11, 1998, the date judgment was first entered against the Defendants.

14. The parties have agreed to a compromise interest rate of 8.5%. Utilizing this rate, the prejudgment interest on the $1,000,000 pain and suffering award from October 4, 1988 to August 11, 1988, the date judgment was first entered, is $837,191.78.

15. The Court next considers the award of prejudgment interest on the award of $550,000 to Tracey Taibl for past pain and suffering. Defendants argue that no prejudgment interest should be awarded because the award was made pursuant to the Florida wrongful death statute and Florida does not allow for prejudgment interest in such cases.

Appendix B

The Court agrees with Defendants. Having sought remedies under the Florida Wrongful Death Act, Plaintiff is bound by all aspects of Florida law with respect to that claim, including prejudgment interest.

16. As a result, the Court determines that it is inappropriate to award prejudgment interest on the $550,000 pain and suffering award.

17. Finally, the Plaintiff argues that this court should award interest on all of the awards from the date of the verdict to the date of this judgment. Plaintiff relies on *Palm Beach County School Board v. Montgomery*, 641 So.2d 183 (Fla. 4th DCA 1994), which held that interest runs from the date of the verdict where, as here, there is a substantial delay in entering judgment. Although *Rockman v. Barnes*, 672 So.2d 890 (Fla. 1st DCA 1996) reached a contrary conclusion, the Court finds *Palm Beach County* to be the more persuasive for the reasons cited therein. Moreover, *Rockman*, although acknowledging a conflict with *Palm Beach County*, offers no persuasive reasoning for denying the postjudgment interest. Furthermore, this Court finds that once a jury returns a verdict, Florida law governs. As a result, the Plaintiff is entitled to interest from the date of the verdict on the remaining awards of $550,000 for Tracey Taibl's past pain and suffering, $500,000 for Tracey Taibl's future pain and suffering, and the $3,500,000 punitive damage award pursuant to Fla. Stat. § 55.03.

Appendix B

IT IS THEREFORE:

ORDERED AND ADJUDGED that Plaintiff, TRACEY TAIBL, Special Personal Representative of the ESTATE OF STACEY NORMAN TAIBL, for the use and benefit of TRACEY TAIBL, minor daughter, and the ESTATE OF STACEY NORMAN TAIBL, recover from the Defendants, JUNO MARINE AGENCY, INC., NAVIERA TURRIALBA, S.A., and GARDA MARINE, INC., jointly and severally, the principal sum of $5,550,000, plus prejudgment interest on the survival action award in the amount of $837,191.78, plus postjudgment interest on the survival action award and its prejudgment interest totaling $1,837,191.78 from August 11, 1998 as set forth in Fla. Stat. § 55.03, and postjudgment interest on the remaining awards of $4,550,000 from the date of the verdict as set forth in Fla. Stat. § 55.03, for which sums let execution issue.

ORDERED in Chambers at Miami, Dade County, Florida, this 31 day of August, 1998.

s/ Harvey Goldstein
HARVEY GOLDSTEIN
Circuit Court Judge

APPENDIX C — ORDER OF THE SUPREME COURT OF FLORIDA DENYING PETITION FOR REVIEW DATED JANUARY 22, 2001

SUPREME COURT OF FLORIDA

MONDAY, JANUARY 22, 2001

CASE NO.: SC00-1763
Lower Tribunal No.: 3D98-2287

JUNO MARINE AGENCY, INC.

Petitioner(s)

vs.

TRACEY TAIBL, ETC., ET AL.

Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

Appendix C

WELLS, C.J., and ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED FEBRUARY 3, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 88-2282-CIV-HIGHSMITH

In re the Complaint of GARDA MARINE, INC., as owner and Naviera Turrialba, S.A. as charterer of the M/V TURRIALBA for Exoneration from or Limitation of Liability.

Feb. 3, 1992.

* * *

ORDER

JACOB MISHLER, District Judge, Sitting by Assignment.

Claimant Tracy Taibl ("Claimant"), as Special Personal Representative of the Estate of Stacey Taibl, moves to modify the order of the court dated October 10, 1991, by restoring the unseaworthiness claim which was dismissed in said order on motion for summary judgment. Claimant bases her request for relief on the recently decided *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81, 112 S.Ct. 486 (December 4, 1991),[1] which held that a maritime worker, whose occupation is one of those enumerated in the Longshore and Harbor Worker's

1. The motion is before the undersigned with the consent of Judge Stanley Marcus, the author of the October 10, 1991, order.

Compensation Act (LHWCA), may nevertheless still be a seaman within the meaning of the Jones Act.

BACKGROUND

This action arises out of an accident that occurred aboard the vessel M/V Turrialba on October 4, 1988. Stacey Taibl, while employed as a stevedoring supervisor by Oceanic Stevedoring Company, Inc., died as a result of inhaling carbon monoxide fumes in the hold of the ship. As part of her claim for unseaworthiness, Claimant argues that Stacey Taibl's presence on board the M/V Turrialba was not as a longshoreman, but rather as a passerby who responded to a rescue call. Judge Marcus disagreed, relying instead on the answer to the petition for Exoneration From or Limitation of Liability, which stated that "decedent while in the course and scope of his employment as a stevedoring superintendent for Oceanic Company, Inc., heeded the cries of plaintiff's agents for emergency assistance . . ." (Omnibus Order, Oct. 10, 1991, at 8).

Judge Marcus went on to hold that, as an employee covered under the Longshore and Harbor Worker's Compensation Act (LHWCA), Stacey Taibl had no right of action for breach of the duty of seaworthiness, citing *McDermott International, Inc. v. Wilander,* 498 U.S. 337, 111 S.Ct. 807, 813 (1991); *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 323 (1990). The opinion quoted the House Report, H.Rep. No. 92-1441, 92nd Cong., 2d Sess., *reprinted* in U.S.Code Cong. and Admin.New 4698, 4703 (1972) as follows:

Appendix D

> The purpose of the amendment is to place an employee injured aboard a vessel in the same position he would be if he were injured in nonmaritime employment ashore, insofar as bringing a third party damage action is concerned, and not endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as unseaworthiness, "non-delegable duty," or the like.

(Omnibus Order, Oct. 10, 1991, at 9-10).

DISCUSSION

We now address the issue of whether *Southwest Marine, Inc. v. Gizoni, supra,* permits reinstatement of Claimant's unseaworthiness claim. In *Southwest Marine,* Byron Gizoni was injured aboard a floating platform while engaged as a rigging foreman in ship repair work. He submitted a claim for, and later received, medical and compensation benefits pursuant to the LHWCA. Gizoni then instituted a separate action against his employer, Southwest Marine, Inc., under the Jones Act, 46 U.S.C. § 688, alleging that he was a seaman injured as a result of his employer's negligence. 112 S.Ct. at 490. The action also contained causes of action for unseaworthiness and for maintenance and cure. *Id.* The Ninth Circuit Court of Appeals, in reversing the District Court's determination that Gizoni was not a seaman as a matter of law, held that questions of fact existed as to his seaman's status, e.g., "whether the floating platforms were vessels in

navigation, whether Gizoni's relationship to those platforms was permanent, and whether he aided in their navigation." 909 F.2d 385, 387 (9th Cir.1990).

The question presented to the Supreme Court was "whether a maritime worker whose occupation is one of those enumerated in the LHWCA, 44 Stat. 1426, as amended, 33 U.S.C. § 901, *et seq.*, may yet be a "seaman" within the meaning of the Jones Act, 46 U.S.C.App. § 688, and thus be entitled to bring suit under the statute." Answering the question in the affirmative and in affirming the Ninth Circuit Court of Appeals, the Supreme Court quoted from *McDermott Int'l. v. Wilander,* 498 U.S. 337, 111 S.Ct. 807 (1991) as follows:

> "The key to seaman status is employment related connection to a vessel in navigation . . . It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work."

In *Petersen v. Chesapeake & Ohio R. Co.,* 784 F.2d 732, 739 (6th Cir.1986), cited with approval by the lower appellate court in *Southwest Marine,* the Sixth Circuit held that "[a] plaintiff is not limited to the remedies available under the LHWCA unless he is unable to show that a genuine factual issue exists as to whether he was a seaman *at the time of his injury.*" (emph. added). Having had the benefit of the testimony at trial, we can safely say that Taibl was not performing or supervising any stevedoring activities at the time in question. He came aboard solely in response to a call for help.

Appendix D

The factually similar *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir.1969) presents another argument in favor of reinstatement of the claim. In that case, Grigsby was a plant guard employed at a land-based facility who responded to a call for help aboard the defendant's barge. The individual he attempted to rescue had been overcome by carbon monoxide while attempting to pump water out of the ship's wing tanks. Grigsby died during the aborted rescue attempt. In sustaining Grigsby's right to the warranty of seaworthiness, the Fifth Circuit determined that Grigsby was "vicariously" a seaman when he responded to the rescue call:

> ". . . His impulsive action in the best tradition of the sea gave him this highly preferred status. Since in doing these human acts, he was doing that which a seaman responding to the call of the sea would have done, he was in a very real sense and in the *Sieracki* sense, doing the work of a seaman. He can accordingly claim the rights of a vicarious seaman including that of the warranty of seaworthiness."

Grigsby, 412 F.2d at 1022 (citing *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731, 733-34 n. 4, 87 S.Ct. 1419, 1421 n. 4 (1967)).

Taibl was aboard the M/V Turrialba not as a visitor of a member of the crew, but rather to do ship's work. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406 (1959) (guest of crew member could not recover on grounds of seaworthiness where aboard vessel merely to "visit a friend"). We need not decide whether

Appendix D

Taibl's allegation in the answer that he responded to the call for help "while in the course and scope of his employment as a stevedoring superintendent . . ." is inconsistent with the statement in the motion for relief that he "was not working as a longshoreman at the time of his death, but instead merely as a passerby . . ." We find that, under *Grigsby,* Taibl had the status vicariously as a seaman and is, therefore, entitled to the warranty of seaworthiness.

Taibl's motion to restore the claim of unseaworthiness that was dismissed in the order of October 10, 1991, is granted.

APPENDIX E — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED APRIL 23, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

88-2282-CIV-HIGHSMITH (MISHLER)

In re the Complaint of GARDA MARINE, INC., as owner and Naviera Turrialba, S.A. as charterer of the M/V Turrialba for Exoneration from or Limitation of Liability.

April 23, 1992.

MEMORANDUM OF DECISION AND ORDER

JACOB MISHLER, District Judge, Sitting by Assignment.

Petitioners, Garda Marine, Inc. ("Garda") and Naviera Turrialba S.A. ("Naviera") as owner and charterer respectively of the vessel M/V Turrialba, have a filed a petition for exoneration or limitation of liability in connection with the claims filed by or on behalf of claimants, Atancio Fajardo ("Fajardo"), Tracey Taibl ("Taibl"), Police Officer Arthur Angelica ("Angelica") and Police Sergeant Thomas Leis ("Leis"), who suffered either severe injuries or death when they were exposed to Carbon Monoxide gas while the M/V Turrialba was docked in the Port of Miami.

The issues were tried to the court.

Appendix E

The M/V Turrialba is a Miami based vessel that transports cargo between Miami and various Latin American Countries. Although the vessel is owned by Garda, the ship is operated and controlled by Linea Naviera Juno, S.A. ("Linea") and Juno Marine Agency, Inc., ("Juno Marine").

At the time of the events complained of, petitioners Garda and Naviera were two corporations owned by Sheik Kadir Sahib Tajudeen and members of his family. ("Tajudeen"). The M/V Turrialba was acquired by Tajudeen through another company he controlled, Servicios Juno A/S. This company then sold the vessel to Naviera for little or no consideration. Naviera then sold the vessel to Garda for $750,000.

Garda and Naviera then entered a bareboat charter whereby Garda chartered the vessel to Naviera in exchange for a note promising to repay the purchase price of $750,000. The agreement provided that Garda would retain title to the vessel for a total of four years, whereupon, Naviera would pay Garda $1.00 in exchange for reacquiring the title.

The actual control and operation of the vessel was conducted by Linea, another Tajudeen corporation. The ship's crew and Captain all signed employment contracts with Linea. The Bills of lading for cargo carried by the vessel were controlled by Linea. All of the Vessel's freight fees were paid directly to Linea controlled Juno Marine, which had port offices in Miami, Panama and Costa Rica.

Fritz Tan ("Tan"), who worked out of Juno Marine's Miami office, was the Marine Superintendent responsible

for the M/V Turrialba. Tan's duties, as the Marine superintendent and the corporate shipowner's representative, included boarding the vessel when it arrived in port and discussing with the Captain, Chief Engineer and Chief Mate, any maintenance or repairs that were necessary for the proper operation of the ship.

Tan personally hired the Captain of the vessel, Raymond DeQuack ("Captain"). The M/V Turrialba is a Panamanian flagged vessel. As such, it requires the Captain to possess a Panamanian license. The Captain did not have a valid Panamanian license when he was hired by Tan, nor did he have such a license at the time of the subject incident. Tan made no attempt to discern whether the Captain was licensed.[1]

On October 2, 1988, two days before the events complained of, the M/V Turrialba was in or around the Port of Miami to prepare for its upcoming voyage to Latin America. While the ship was anchored just outside the Port, the Vessel's Chief Mate, Maijan Legac ("Legac") informed the Captain that there was water in the chain locker. The chain locker is used to store the anchor chain and is connected to the deep tank, which is used for ballasting[2] when cargo is being loaded on and off the ship.

---

1. Chief Mate Legac had only a Croatian license which is not an acceptable certificate of competence. Likewise, the remaining senior officers on the M/V Turrialba did not have a certificate of competence issued by the Republic of Panama.

2. Ballast is "[heavy] material that is placed in the hold of a ship . . . to enhance stability." *American Heritage Dictionary* at 153. (2d ed. 1985).

Appendix E

To gain access to the deep tank and chain locker, one must travel down a stairway into the "bosun's locker."[3] In the deck of the bosun's locker there are man-hole sized openings which lead to both tanks. One may go to the bottom of the deep tank by using a ladder which is welded on to the deep tank wall.

There is a valve in the deep tank which controls the amount of water that flows in and out. This valve is attached to a wheel located in the bosun's locker. The Captain tried to use the valve to drain the excess water in the tank, but was unsuccessful.

The Captain then ordered the crew to empty the deep tank by using a portable gas powered pump. He entrusted the entire operation to Chief Mate Legac, who was unfamiliar with apparatus, and had been working on the ship for less than two months. Tan had placed the pump aboard the vessel for the purpose of cleaning the deep ballast tank.

Affixed on the gas powered pump was a bright red label with a skull and crossbones (Ex. 13) which read: "DANGER ENGINES PRODUCE CARBON MONOXIDE WHICH IS AN ODORLESS DEADLY POISON DO NOT OPERATE IN AN ENCLOSED AREA."[4] The Captain did not remember reading the warning label. However, he testified that he was

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3. Bosun is a variant of boatswain. A boatswain is a "warrant officer or petty officer in charge of a ship's deck crew, rigging, anchors and cables." *American Heritage Dictionary,* at 192 (2d ed. 1985).

4. Carbon Monoxide is an odorless and colorless gas.

aware of the harm that could be caused by the accumulation of carbon monoxide gas if the pumping area was not properly ventilated. (Tr. p. 956).

Although aware of the consequences that would result if fresh air was not admitted into the tank, the Captain did not take any steps to ventilate the pumping area, nor did he warn his crew about the repercussions of failing to do so. Legac had been instructed to ventilate the tank, but ignored the Captain's orders.

The Captain provided the crew with no guidance while they operated the pump, nor did he observe the crew as the tank was drained. In fact, the Captain had never used a gas pump before and was unfamiliar with its operation.

Throughout the course of the pumping operation, the crew neglected to use either a portable ventilator, the permanent ventilation stacks on the bosun's locker and forward deck, or the hatch of the bosun's locker.[5] The Captain and Chief Mate Velasco both testified that these methods should have been used to ventilate the tanks before were crew members could safely enter.

Initially, the gas pump was placed in the bosun's locker with the hose extended through the man-hole cover into the deep tank. This proved to be inadequate because the hose

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5. Tarpaulins were placed on the permanent ventilation stacks while the vessel was at sea so as to prevent water from entering the tanks. These tarpaulins continued to cover the ventilation stacks throughout the course of the pumping operations which prevented the poisonous gas from escaping.

was only ten feet long. The Captain then ordered Legac to place the pump into the deep tank itself. The pump operated from the afternoon or early evening of October 2, until approximately 3:00 a.m. on October 3rd, when it ran out of fuel.

The M/V Turrialba docked at the Port of Miami at 9:00 a.m. on October 3. The Captain left the ship to purchase gasoline for the pump. After he purchased the fuel, the Captain returned to the vessel, gave the gasoline to Legac, and ordered him to continue the pumping operation until all the water was removed from the deep tank.

The Captain also informed Marine Superintendent Tan that the ballast pump had malfunctioned and that he had ordered the crew to use a portable gas pump. Tan was aboard the ship for approximately one or one and one half hours and observed the crew pumping the water out of the tank.[6]

In the afternoon, the Captain left the ship and did not return until the next morning. While the Captain was ashore, Legac, in addition to his duties as supervisor of the pumping operation, became master of the vessel. The pumping lasted from the afternoon of October 3rd, through the early morning hours of October 4th.

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6. Tan testified that he told members of the vessel "to pump . . . the water out before working on it, after that we can see how much plate we have to renew." (Tr. at 879). He never actually observed the crew pumping the water and claimed that he was unaware that a gas pump had been used.

Appendix E

When the Captain returned to the ship on the morning of October 4th, he was told that all of the water had been removed from the deep tank. The Captain then ordered Legac to send members of the crew into the tank to repair the broken valve.

On that same morning, Legac's tenure with the ship had expired and he was replaced as Chief Mate by Eustacio Velasco ("Velasco"). Velasco reported to the Captain, who did not advise him of the pumping operation. Instead the Captain told him to meet with Legac, who simply told him that there was a problem with the flow of water in the tank.

Legac was in a hurry to depart the ship and did not escort Velasco to the Bosun's locker. Instead, he advised him to go into the deep tank, with Assistant Engineer Mercado, to determine the nature of the problem. Neither Legac nor the Captain informed Velasco that a gas pump had been used to remove the excess water or of the potential danger he would face if he entered the unventilated tank. Nevertheless, Velasco, who had just arrived on the ship, was now put in charge of the operation to repair the broken valve in the deep tank.

Velasco and Mercado slowly began their descent into the deep tank. Upon reaching the bottom, they discovered that the rod which connected the wheel in the bosun's locker to the valve was not functioning because it had been eroded by prolonged contact with the salty ocean water.

Once the men had detected the problem, an attempt was made to climb the ladder to retrieve the tools necessary to

repair the damaged rod. While on the ladder, Mercado collapsed as a result of his exposure to carbon monoxide fumes. Velasco was able to flee the tank, where, after catching his breath, he reentered, along with claimant Seaman Fajardo, in an attempt to rescue Mercado.

Velasco and Fajardo were unable to lift Mercado out of the tank. Fajardo stayed in the tank while Velasco went on to the bridge to seek help. Velasco was having difficulty walking. While he was on the ship's deck he shouted, "Help! Help! Oxygen! Oxygen" (Tr. p. 738).

Seaman Caceres heard Velasco's cries for help and told Second Mate Gamboa that there was an unconscious man in the tank. Gamboa alerted the Captain that the men sent into the tank may have been killed. Moments later, Velasco stumbled up the stairs and informed the Captain that Mercado and Fajardo were unconscious in the tank. The Captain realized then that these injuries were caused by carbon monoxide.[7]

The Captain informed the Coast Guard, via telephone, that two members of his crew were unconscious in the vessel's deep tank. He neglected to advise them that their injuries were caused by carbon monoxide nor did he instruct them to bring oxygen equipment to the vessel. He also asked the Coast Guard to inform Tan of the injuries. The Captain

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7. The Captain testified that he saw Velasco stumbling toward him and determined that his injuries were caused by exposure to carbon monoxide. After he arrived at this conclusion, he telephoned the Coast Guard. (Tr. p. 993).

made a conscious decision not to tell the members of his crew that carbon monoxide was involved because he "didn't want to alarm everybody." (Tr. p. 993).

RESCUE ATTEMPTS

Claimant, Police Officer Angelica, who was posted at the Port of Miami security gate, was told by a crew member that a man aboard the M/V Turrialba had fallen and received injuries. Angelica believed that he was dealing simply with an injury caused by a slip and fall. He had not been informed that carbon monoxide was involved. Before departing for the ship, Angelica contacted claimant Police Sergeant Thomas Leis of the Bay Operations office on Key Biscayne by police radio. Leis was told that a slip and fall injury had occurred.

Fire Rescue Unit One received a dispatch, presumably from the Coast Guard, indicating that injuries aboard the vessel had been caused by a slip and fall. There was no indication that any noxious fumes had been involved.[8] As a result, the fire department did not bring any oxygen equipment aboard the vessel or deploy the hazardous rescue team.

The Captain neglected to post crew members at various points of the ship to inform the arriving firefighters of the true nature of the accident. The firefighters testified that when they reached the vessel, the crew was loading cargo onto the

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8. Firefighter Marsh testified that "the call came in as a man down, fell in a hole." (Tr. p. 679).

ship and it looked as though it was simply "business as usual." This confirmed the initial report given to the fire department that a simple slip and fall had occurred.

Shortly after the Captain had been informed that the men had been exposed to carbon monoxide, claimant Taibl, a stevedoring supervisor, arrived at the scene. Taibl noticed that a fire rescue unit was approaching the M/V Turrialba. When he was close to the ship, a crew member informed him that there were injured men in the tank. Taibl was unaware of the presence of any toxic fumes.

Upon arriving at the vessel, Taibl observed firefighters Clark, Marsh and Martinez rendering assistance to Velasco, who had been exposed to carbon monoxide. Velasco was in somewhat of a delirious state and the firefighters could not determine the nature of his affliction.

Taibl approached Clark and urged him to do something to rescue the people still trapped in the tank. Taibl and Clark opened the hatch on the tank and observed that it was filled with smoke. Clark advised Taibl that he would not enter the smoke filled tank without an oxygen mask. Taibl feared that the men in the tank were in great danger and informed Clark that he would rescue the men himself.

He found a flashlight and some rope and proceeded into the tank. Clark watched Taibl go down the first flight of stairs and then felt compelled to assist in Taibl's rescue effort. After reaching Fajardo, they tied a rope around his body in an effort to hoist him out of the tank. Taibl yelled to the top of the chamber for someone to pull on the rope.

Appendix E

Unfortunately, the Captain, who was aware of the carbon monoxide problem, did not post any members of his crew at the entrance of the tank to assist in the rescue effort.

Taibl and Clark then tried to carry Fajardo's body out of the chamber. Due to oil residue at the base of the tank, Taibl slipped and fell. He was unable to stand up because his body had been effected by the deadly gas. Clark, who was already feeling dizzy, realized that he had to exit the chamber. With tremendous difficulty, Clark climbed up the ladder and with assistance, was able to exit the tank.

After leaving the chamber, Clark insisted that others enter the tank to rescue Fajardo and Taibl who were trapped below. In the chaos and confusion surrounding the rescue effort, the rescue workers were still unaware that carbon monoxide was in the chamber, though they suspected that when Clark stumbled out of tank, some type of toxic gas was involved. Clark was able to advise those in the vicinity that the tank to was too narrow for the firefighters to use their oxygen tanks.

While Taibl and Clark were still in the deep tank, Officer Angelica arrived at the ship. He then assisted firefighters Marsh and Martinez in rendering assistance to Mercado, who narrowly escaped the tank. Angelica observed that Mercado had an incision on his forehead and wet clothes. This led him to conclude that Mercado was injured not because of his exposure to toxic gas, but rather due to a slip and fall in the tank.

Appendix E

At this point, the events were rapidly unfolding and the rescue workers had to make split-second, life saving, decisions. This confusion was enhanced by the screaming, yelling and crying of those in the vicinity.

After Clark staggered up from the tank, firefighter Marsh entered the tank with her oxygen apparatus. The oxygen equipment she was wearing made it difficult for her to maneuver through the tanks' narrow corridors and slippery ladders. The firefighter required Angelica to enter the tank to assist her in reaching the base of the chamber. Marsh did not stop Angelica from assisting her nor did Angelica believe that any toxic substances were involved. Based on Mercado's condition, he believed that there may have been drowning victims below.

Marsh and Angelica reached the bottom of the tank and observed that Fajardo had died and that Taibl was lying on the floor gasping for air. They removed the rope that had been tied to Fajardo and placed it around Taibl in an attempt to hoist him out of the chamber. However, Taibl was too heavy to move. Shortly thereafter, Angelica began to feel the effect of the deadly gas. He attempted to climb the ladder to reach the surface but was unsuccessful.

At this point, claimant Sergeant Leis arrived. Leis encountered his supervisor, Captain John Coogan, who informed him that he was unsure exactly what was happening but that Angelica was down below. Angelica was told by firefighter Clark that there were toxic fumes present in the chamber. Clark believed that the gas may have been carbon monoxide. Leis attempted to secure an oxygen mask, but

was unsuccessful because all of the tanks were empty. There was no oxygen available on the ship and no crew members in the vicinity who may have been able to provide assistance in locating such equipment.

Leis was then told by another firefighter that if Angelica were not rescued immediately, he would die. With the approval of his supervisor, he entered the tank in an effort to save Angelica.

Leis reached the bottom and saw Angelica struggling to breathe and firefighter Marsh having difficulty lifting Taibl off the floor. Leis was able to assist Angelica in exiting the tank. He then went back into the chamber to help Marsh remove Taibl from the tank. Marsh was in a state of panic.

Once Marsh and Leis were able to bring Taibl to the top of the tank, the hazardous rescue team, that had been called by the fire department when they learned the true nature of the problem, arrived at the location. Although Taibl was alive when he exited the tank, he died a short while later in the hospital.

During the course of the rescue operations, the Captain remained on the bridge until he saw a fire rescue unit approach. The Captain was unable to see the first unit that arrived because they parked on the side of the ship, in an area that was difficult to see while standing on the bridge. The first fire units that the Captain observed were on the scene ten minutes after Taibl and Clark had entered the tank. By the time the Captain had met with the fire personnel, all of the claimants had entered the tank.

Tan had been in the bosun's locker area while the claimant's had entered the deep tank. Only after the claimants had entered the chamber did Tan meet with the Captain.[9]

As stated earlier, Fajardo died in the tank and Taibl died shortly after he reached the hospital. Claimants Angelica and Leis sustained injuries while responding to the call for assistance. Leis has since died and there is some dispute as to whether his death was caused by his exposure to carbon monoxide.

DISCUSSION

46 U.S.C. § 183(a) provides:

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by an person of any property goods, or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section,

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9. We place little stock in Tan's testimony that he warned all who entered the tank that it was filled with carbon monoxide gas. The firefighters on the scene were unaware the gas was in the chamber so it is difficult to understand how Tan was able to make this determination. Tan testified that members of the crew told him that gas was in the tank but it is clear that the Captain did not tell the crew that carbon monoxide was involved.

> exceed the amount of value of the interest of such owner in such vessel, and her freight then pending.

Pursuant to § 183(a), petitioners may limit their liability to the value of M/V Turrialba, if they did not have "privity and knowledge before the start of the voyage of the acts of negligence or conditions of unseaworthiness that caused the accident." *Hercules Carriers, Inc. v. Claimant State of Fla.*, 768 F.2d 1558, 1563 (11th Cir.1985).

There is a two-part test to determine whether a shipowner may limit his liability.

> First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness. . . . Moreover, once a claimant satisfies the initial burden of proving negligence or unseaworthiness, the burden of proof shifts to the shipowner to prove the lack of privity or knowledge.

Hercules Carriers Inc. at 1563-64, *citing, Farrell Lines Inc. v. Jones,* 530 F.2d 7, 10 (5th Cir.1976).

NEGLIGENCE AND UNSEAWORTHINESS

The shipowner owes a reasonable duty of care to all those who are legally aboard the vessel. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 632, 79 S.Ct. 406,

410 (1959). If the shipowner breaches this duty by acting in a negligent manner, such negligence must be the proximate cause of claimant's injuries. *Hercules Carriers, Inc.* at 765; *Board of Commissioners of the Port of New Orleans v. M/V Farmsum,* 574 F.2d 289, 297 (5th Cir.1978).

We find that the claimants have satisfied their burden of proving that petitioner's negligence rendered the vessel unseaworthy which proximately resulted in claimants injuries.

In the case at bar, petitioners negligence involves:

> evidence of careless or improper operation of the ship by the crew. Because the shipowner has a non-delegable duty to provide a competent master and crew, unseaworthiness can be caused by insufficient manning of the vessel or an incompetent crew.

Hercules Carriers, Inc. at 765.

It is clear in this case that both the Captain and the crew of the M/V Turrialba were incompetent.

The Captain of the vessel authorized the use of a gas powered pump even though he had never used one before and was unfamiliar with its operation. He placed Legac, a man he knew for only two months, in charge of the entire pumping operation, without determining whether he was familiar with the apparatus.

Appendix E

While the Captain claims to have instructed Legac to ventilate the chamber, such orders were apparently ignored or not comprehended by the Chief Mate. Petitioners admit that Legac was negligent in causing the carbon monoxide to accumulate in the deep tank. (Petitioners Post-Trial Memo. at 1.).

Although the Captain knew that carbon monoxide would accumulate if certain precautions were not taken, he did not oversee the pumping operation to determine if the tank had been properly ventilated. The pumping operation lasted for two days but the Captain failed to notice that tarpaulins covered the ventilators over the bosun's locker and forward deck.

The Captain also failed to instruct members of his crew about the dangers caused by improper ventilation. If the Captain had bothered to instruct the crew that carbon monoxide would accumulate, is it likely that the chamber would have been ventilated.

We find that the Captain was obliged to inspect the work of the crew members to see if the pumping operation was conducted properly. The failure to properly instruct and oversee his crew was a clear example of negligent conduct.

We also find that Tan was negligent in failing to oversee the pumping operation. Tan's principle duty was to oversee the maintenance of the ship. Yet, when he boarded the vessel during the pumping operation, he neglected to observe the crew as they pumped the tank. Furthermore, Tan did not ask any of the ship's officers about the method that was being

used to remove the excess water. If Tan had fulfilled his responsibilities, he would have noticed that the tank was not properly ventilated.

The negligence of the Captain, the Chief Mate and Tan was further compounded by the Captain's deliberate failure to provide vital information about the disaster both to rescuers and members of the crew.

When the Captain phoned the Coast Guard, he neglected to inform them that the injuries were caused by exposure to carbon monoxide. As a result, the fire rescue unit assumed that the injuries on the vessel were the result either of a slip and fall accident or a drowning. The failure of the Captain to fully inform the fire department caused the deployment of the wrong personnel and equipment. This delay proximately resulted in the claimants' injuries.

The Captain also deliberately failed to inform his crew that carbon monoxide had rendered the men unconscious. He neglected to post crew members at the entrance of the tank to assist the rescuers. If the Captain had immediately dispatched informed members of his crew to the tank, they could have alerted the fire department and other rescuers that carbon monoxide was involved. This information would have led the firefighters to procure the proper equipment. Instead, any crew members who were on the scene only added to the confusion, because, like the rescuers, they did not know that the injuries were caused by exposure to carbon monoxide.

Another factor indicating that the crew was incompetent was the fact that the Captain and the Chief Mate did not

have valid licenses. *See Hercules* at 1574 ("[C]ourts have noted that it is possible to estimate the competency of a vessel's crew by examining their licenses."). *Hercules* at 1574. The purpose of licensing requirements are to insure "that seamen are properly trained and will know their duties and responsibilities when aboard a vessel at sea." *Id.* The invalid licenses of the Captain and Chief Mate are "further evidence that [they were] ill-equipped to perform the duties necessary for the [operation] of the vessel." *Id.*

THE WARRANTY OF SEAWORTHINESS AND DUTY OF REASONABLE CARE ARE EXTENDED TO MARITIME RESCUERS

In *Grigsby v. Coastal Maritime Service of Texas, Inc.*, 412 F.2d 1011 (5th Cir.1969), *cert. denied,* 396 U.S. 1033, 90 S.Ct. 612 (1970), the court extended the warranty of seaworthiness to maritime rescuers.

> [O]f all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life limb and property. . . . Maritime law in every way and in every context encourages the salvor to salve — to save. . . . [The rescuer's] impulsive action in the best tradition of the sea [gives] him this highly preferred status. Since in doing these human acts, he was doing that which a seaman responding to the call of the sea would have done, he was, in a very real sense and in the *Sieracki* sense, doing the work of a seaman. He can accordingly claim the rights of a vicarious seaman including that of the warranty of seaworthiness.

Appendix E

Petitioners continue to assert the argument, twice dismissed by Judge Marcus, that claimants Angelica and Leis are not entitled to a warranty of seaworthiness because the 1972 amendment to the Longshore and Harbor Workers' Compensation Act ("LHWCA") abolished *Sieracki* seaman status for harbor workers. 33 U.S.C. § 901, et seq.[10]

As Judge Marcus stated in his Omnibus Order of October 10, 1991:

> We believe . . . that *Grigsby* remains good law in this circuit. In *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Cir.1981), a case decided after the 1972 amendment to the LHWCA abolished *Sieracki* seaman status for harbor workers, and with it the ability of these workers to sue for breach of the duty of seaworthiness, the Court of Appeals explicitly stated:
>
> > Section 905(b), which Congress enacted to abolish the *Sieracki* remedy, *does not apply to maritime workers who are not within the coverage of the LHWCA. The statute manifests no intention to expand the abolition of the Sieracki-Ryan construct beyond the LHWCA.* . . .

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10. The Supreme Court, in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872 (1946), held that the obligation of seaworthiness traditionally owed to a seamen was extended to a stevedore who was injured while working aboard a vessel.

Appendix E

> As we held in our order of July 17, 1990, we believe that *Aparicio,* read in conjunction with *Grigsby* supplies a sufficient basis upon which Leis [and Angelica] may assert an unseaworthiness claim.

Omnibus Order at 25-26.

Petitioners also insist that no duty of seaworthiness was owed to Angelica and Leis because they were professional rescuers and as such "[t]here can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness." *McDaniel v. Lisholt,* 282 F.2d 816, 817 (2d Cir.1960).[11]

The rule in *McDaniel* does not apply in this case because Angelica and Leis were unaware that the ship was unseaworthy when they came aboard and did not enter the vessel because of the unseaworthy condition. These claimants had a good faith belief that a simple slip and fall accident had occurred. We find that Angelica and Leis were entitled to a warranty of seaworthiness.

Assuming arguendo that there was no warranty of seaworthiness, a shipowner still "owes to all who are on board for purposes not inimical to his legitimate interests the duty of exerting reasonable care under the circumstances of each case." *Kermarec,* 358 U.S. at 632, 79 S.Ct. at 410

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11. The holding in *McDaniel, supra* was adopted by the Fifth Circuit in *Grigsby* at 1030.

(1959). Although *McDaniel* held that the firefighter was not entitled to a warranty of seaworthiness, the court still had to determine whether the shipowners had committed any acts of negligence that led to McDaniel's injuries. *McDaniel* at 817.[12]

In *Pastore v. Taiyo Gyogyo KK*, 571 F.2d 777 (3d Cir.1978), the court upheld a judgment against a shipowner for negligently failing to warn a firefighter about certain conditions in the hold of the vessel. Though the crew was posted about the ship, they failed to inform the firefighter that one of the walls in the hold was not a part of the ship's deck, but rather a tarpaulin which covered a pile of frozen lamb. When the firefighter placed a ladder against the tarpaulin, the surface was not steady, causing him to fall and receive injury.

The court found that in an emergency situation, caused by the negligence of the shipowner, it was foreseeable that fire rescue personnel would enter the vessel. As such, "the defendant's crew did not supply the information necessary to enable a land-oriented fire fighting unit to deal effectively with the unusual conditions aboard ship and that duty [to warn of the hazardous condition] became triggered by the fire." *Pastore* at 782.

The facts of this case make it abundantly clear that the Captain breached his duty to warn Angelica and Leis of the

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12. The court in *McDaniel* found that the shipowner did not breach his duty to warn the firefighter of any latent hazardous conditions aboard the vessel. *Id.*

latent dangerous conditions aboard the vessel. This negligence proximately caused claimants' injuries.[13]

Petitioners maintain that they did not breach the duty of reasonable care owed to Leis because he knew that toxic fumes were in the tank. This argument is without merit.

It is axiomatic that when a defendants' negligence causes a hazardous situation that results in injury, the defendant is responsible not only to the victim, but also to his rescuer. *See Hanseatische Reederei Emil Offen & Company v. Marine Terminals Corporation,* 590 F.2d 778, 784 (9th Cir.1979). The classic statement of the "danger invites rescue" rule was enunciated by Judge Cardozo.

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. . . . The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path. . . . The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

Wagner v. International R.R. Co., 232 N.Y. 176, 180; 133 N.E. 437, 437-38 (1921).

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13. Petitioner's have admitted that their negligence caused the death of crew member Fajardo. (Tr. at 21-22, 1125).

Appendix E

The Captain and the crew negligently failed to warn those who entered the tank that it contained poison gas. As a result of this negligence, Angelica became trapped in the chamber. Although Leis was told by firefighter Clark that there were toxic fumes in the tank, he entered the chamber to rescue Angelica. Pursuant to the principles outlined above, petitioners are responsible for the consequences that flow from their negligent conduct and as such are liable for Leis' injuries.

In a decision dated February 3, 1992, we held that claimant Taibl was a seaman under the Jones Act and thus entitled to a warranty of seaworthiness. We find that the unseaworthiness of the M/V Turrialba proximately resulted in Taibl's death.

Even if Taibl was not entitled to a warranty of seaworthiness, petitioners are responsible for his injuries because Taibl's attempted rescue was the result of petitioner's negligent failure to ventiliate the tank. *See Wagner, supra.* Furthermore, petitioners concede that pursuant to *Kermarec, supra,* Taibl was owed a duty of reasonable care under the circumstances. (Petitioner's Memo. at 18). Petitioner's breached this duty by failing to warn Taibl of the hazardous conditions in the tank.

Claimants established negligence of the Captain and crew and that such negligence was a legal cause of the deaths of Fajardo and Taibl and the injuries to Angelica and Leis. The dangerous condition in the deep tank rendered the vessel unseaworthy.[14]

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14. We need not pass on the question of whether the rescuers were contributorily negligent. This issue is properly reserved for the trial that will be held on the damage claims.

Appendix E

PRIVITY AND KNOWLEDGE

Petitioners are liable to claimants beyond the value of the vessel if, before the start of the voyage, they had privity and knowledge of the acts of negligence that caused the accident or the unseaworthiness of the vessel.[15] The burden is on the petitioners to demonstrate their lack of privity and knowledge.

> This burden is not met by simply proving a lack of actual knowledge, for privity and knowledge is established where the means of obtaining knowledge exist, or where reasonable inspection would have led to the requisite knowledge.

Hercules Carriers, Inc. at 1564.

A corporate shipowner is bound by the privity and knowledge of "a managing agent, officer, supervising employee, including supervisory shoreside personnel." *Hercules* at 1574; *See also Coryell v. Phipps,* 317 U.S. 406, 410, 63 S.Ct. 291, 293 (1943) ("[L]iability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred.").

We find that Fritz Tan, the Marine Superintendent, and an employee of Juno Marine, which was the corporation designated by Garda and Naviera to operate the M/V Turrialba, was the supervisory shoreside employee who had

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15. The M/V Turrialba was in port, preparing for its next voyage, when the accident occurred.

privity and knowledge of the negligent conditions aboard the vessel. "[K]nowledge is not only what the shipowner knows but what he is charged with discovering in order to apprise himself of conditions likely to produce or contribute to a loss." *Hercules* at 1564. Tan, who was responsible for the maintenance of the ship, should have discovered that the tank was not properly ventilated.

In *In re Petition of Henry Du bois' Sons Co.*, 189 F.Supp. 400 (S.D.N.Y.1960) (Weinfeld, J.), the shipowner had an outside superintendent in charge of the vessel, who, like Tan, was responsible for overseeing the maintenance of the ship and for hiring members of the crew. The hull of the vessel in *Henry Du bois' Sons Co.* was in such poor condition that as a result, the ship capsized and a crew member was killed. The court held that because the superintendent had authority over the ships maintenance and failed to insure that the ship's hull was kept in proper condition, he had privity and knowledge of the negligent condition that caused the injury. The superintendent's privity and knowledge was binding on the shipowner, who was unable to limit his liability.

We find that the privity and Knowledge of Tan, as the agent of Juno Marine, is the privity of knowledge of petitioners Garda and Naviera. *See China Union Lines, Ltd. v. A.O. Andersen & Co.*, 364 F.2d 769, 787 (5th Cir.1966), *cert. denied*, 386 U.S. 933, 87 S.Ct. 955 (1967) ("Knowledge or privity of supervisory shore personnel is sufficient to charge a corporation.").[16]

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16. We reject petitioners argument that Tan's actions were not binding on the shipowners because in some instances, he had to (Cont'd)

Appendix E

Limitation of liability will not be permitted for an additional reason. Courts have held that liability may not be limited when, as in this case, the incompetence of the crew renders the ship unseaworthy. *Hercules Carriers, Inc.* at 1563; *Tug Ocean Prince, Inc. v. United States,* 584 F.2d 1151, 1155 (2d Cir.1978), *cert. denied,* 440 U.S. 959, 99 S.Ct. 1499 (1979) ("It is within the owner's duty to use due and proper care to provide a competent master and crew and to see that the ship is seaworthy; any loss occurring by reason of fault or neglect in these particulars is within his privity."); *see also Brister v. A.W.I. Inc.,* 946 F.2d 350, 357 (5th Cir.1991); *Hellenic Lines, Ltd. v. Prudential Lines, Inc.,* 813 F.2d 634, 638 (4th Cir.1987).

Likewise, limitation of liability will not be permitted where the Captain fails to supervise the members of his crew whose negligence caused the accident. *In re Potomac Transport Inc.,* 909 F.2d 42, (2d Cir.1990). In *Potomac Transport,* a corporate shipowner was not entitled to limit his liability when the captain of the vessel "failed to observe or stand watch with third mate Kampmann, despite this having been Kampmann's first voyage as a license third mate." *Id.* at 46. The court went on to observe that:

(Cont'd)
report to a superior at Juno Marine. As the court stated in *Henry Du Bois' Sons. Co.,* "the fact that the [superintendent] reported to superior officers the need for repairs 'does not mean that he was not himself near enough to the top to charge the owner.' " 189 F.Supp. at 402, *citing Great Atlantic & Pacific Tea Co. v. Lloyd Brasiliero,* 159 F.2d 661, 664 (2d Cir.), *cert. denied,* 331 U.S. 836, 67 S.Ct. 1519 (1947).

Appendix E

> [t]he failure of a ship's master to exercise diligence in selecting, training, or supervising crew members whose navigational faults contribute to an accident is proper ground to deny limitation of liability.

Id., See also Spencer Kellogg Co. v. Hicks, 285 U.S. 502, 512, 52 S.Ct. 450, 453 (1932) (Limitation of liability is properly denied when a ship's master operates the vessel inconsistent with "rules" and "reasonable judgment.").

Petitioners have been unable to satisfy their burden of proving lack of privity and knowledge.

CONCLUSION

We find that the petitioners had privity and knowledge that the M/V Turrialba was unseaworthy.

It is therefore ORDERED, ADJUDGED, and DECREED that petitioner's motion for exoneration and limitation of liability is denied.

The action is referred back to Judge Highsmith for further proceedings with relation to the outstanding claims.

DONE AND ORDERED in chambers at the United States Courthouse, Federal Courthouse Square, Miami, Florida, this 23rd day of April, 1992.

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 15, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-4907
D.C. Docket No. 88-2282-CIV-SH

IN RE THE COMPLAINT OF:

GARDA MARINE, INC., as owner and NAVIERA TURRIALBA, S.A., as Charterer of the M/V TURRIALBA for Exoneration from or Limitation of Liability,

Petitioners-Appellants,

versus

NORMITA STODOMINGO FAJARDO, as Personal Representative of the Estate of Atanacio Fajardo; JUDITH SCHWARTZ, as Personal Representative of the Estate of Stacey Taibl; TRACEY TAIBL, individually, and as Special Personal Representative of the Estate of Stacey Taibl,

Claimants-Appellees,

THOMAS LEIS, deceased; JESSICA LEIS, individually, as Personal Representative of the Estate of Thomas Leis, and on behalf of Jaime Leis and Misty Leis, the natural children of Thomas Leis; ARTHUR ANGELICA; LIBERTY MUTUAL INSURANCE CO.; ROY W. and ALICIA GEER,

Claimants.

Appendix F

Appeal from the United States District Court
for the Southern District of Florida

(February 15, 1996)

Before KRAVITCH, ANDERSON and BARKETT, Circuit Judges.

PER CURIAM:

This admiralty case stems from a wrongful death action claimants filed in state court. Petitioners subsequently filed this federal action for exoneration or limitation of liability. The district court accordingly stayed state court proceedings pending the outcome of this federal action; in addition, the district court severed the issue of exoneration and limitation of liability from the issue of damages.

Petitioners filed, *inter alia*, a motion for summary judgment on the issue of punitive damages, which the district court denied in a non-final Omnibus Order on October 10, 1991. The court then held a bench trial on liability, and on April 23, 1992, it entered a memorandum order and decision denying exoneration and limitation to petitioners. Petitioners appealed the decision, but this Court affirmed. 9 F.3d 1558.

As the action was then ready to proceed to trial on the issue of damages, petitioners renewed their motion for summary judgment regarding punitive damages, while claimant Tracey Taibl petitioned the district court to relinquish jurisdiction and remand the action to state court based upon the "Saving to Suitors" clause of 28 U.S.C.

§ 1333(1).[1] In a non-final Omnibus Order of July 21, 1994, the district court denied petitioners' renewed motion for summary judgment. On July 28, 1994, the district court, treating claimant Taibl's petition as a motion to dismiss the federal action, issued a final order of dismissal, in which it granted the motion to remand, lifted the stay of the related state court proceedings, and denied any pending motions as moot.

Petitioners now appeal. We AFFIRM the district court's order of July 28, 1994, the effect of which is to moot and vacate any prior orders regarding punitive damages which are within the purview of the state court to decide.

AFFIRMED.

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1. Pursuant to 46 U.S.C. § 185, the district court has great discretion in deciding whether to retain jurisdiction over claims which spawned the limitation of liability proceeding, or to permit the claimants access to another forum. *Helena Marine Serv., Inc. v. Sioux City & New Orleans Barge Lines, Inc.*, 564 F.2d 15, 17 (8th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

Claimant-appellee Normita Stodomingo did not oppose the petition to remand.

APPENDIX G — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED NOVEMBER 16, 1993

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4558

In re Complaint of GARDA MARINE*

Nov. 16, 1993

Appeal From: S.D.Fla.

AFFIRMED.

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* Local Rule 36 case.